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**SUPREME COURT OF THE
UNITED STATES**

October Term 19____

No. 197 ✓

GEORGE W. CASHMAN,
PETITIONER,

vs.

THE MARSHALL'S U. S. AUTO SUPPLY, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To require the Circuit Court of Appeals, Tenth Circuit, to
certify to the Supreme Court, for its review and de-
termination, the case of The Marshall's Auto Supply, Inc.,
Appellant, v. George W. Cashman, Appellee, No. 1983;

and

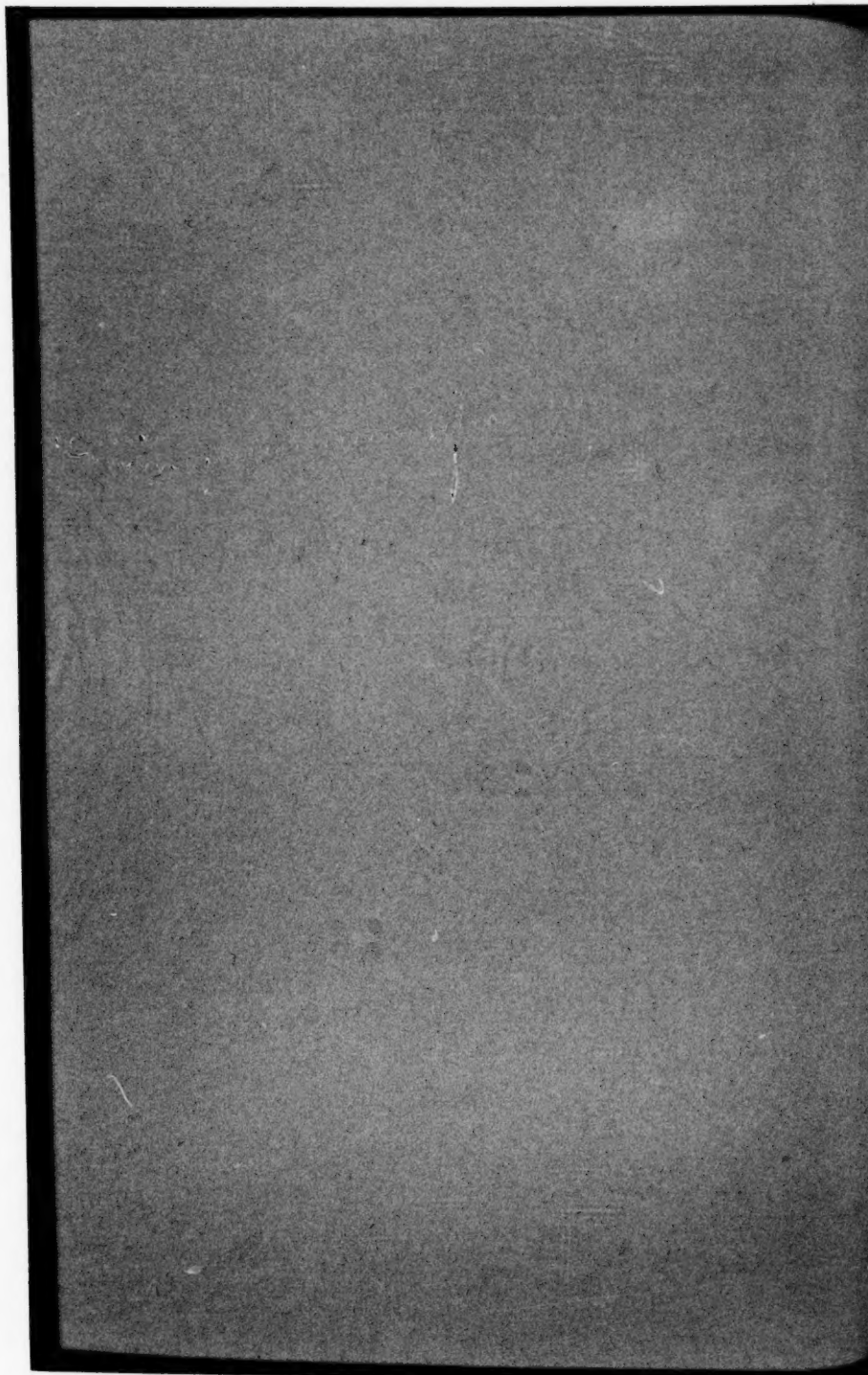
BRIEF IN SUPPORT THEREOF.

CHARLES ROONEY,
of Topeka, Kansas,

ROY N. McCUE,
of Topeka, Kansas,

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of Topeka, Kansas,

Counsel for Petitioner.



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THE MARSHALL'S U. S. AUTO SUPPLY, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To require the Circuit Court of Appeals, Tenth Circuit, to certify to the Supreme Court, for its review and determination, the case of The Marshall's Auto Supply, Inc., Appellant, v. George W. Cashman, Appellee, No. 1983.

May It Please The Court:

The petition of George W. Cashman respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves an interpretation of the Federal Rules of Civil Procedure, and particularly Rule 59 thereof, with relation to the power and discretion of a federal trial court to grant a new trial in a civil case tried to a jury.

In this case, the petitioner (plaintiff below) was granted a new trial after a verdict for defendant. (T. 42-44) Upon the second trial, petitioner recovered judgment for \$9,300.00. (T. 117) Upon appeal, the Circuit Court of Appeals reversed the case upon the sole ground that the court had no power to grant a new trial (T. 127-131), either upon the grounds stated in plaintiff's motion (T. 42) or for the reason that the court was not satisfied with the verdict (T. 44).

The essential facts of the case and the proceedings in the trial court are concisely stated in the opinion of the Circuit Court of Appeals, from which we adopt the following as a part of this petition:

"This is a suit to recover damages for personal injuries. Reference will be made to the parties as they appeared in the court below. Plaintiff purchased from defendant at its store in Topeka, Kansas, a tire for his automobile. Defendant maintained a continuing arrangement with a nearby garage under which for an agreed fee to be paid by defendant the garage mounted tires sold by defendant on the automobiles of the purchasers when the employees in the store were too busy to do so themselves. On the occasion in question the manager of the store requested the manager of the garage to mount the tire on the automobile of plaintiff, and an employee of the garage did so. The automobile was old, some of the cogs were broken from the flywheel, the self-starter would not function, and in consequence it was necessary to crank the motor by

hand. Soon after the tire had been mounted, plaintiff cranked the motor, the engine was in gear, the car sprung forward, plaintiff was pinned between the front of the car and a brick wall, and he sustained serious injuries. The two major issues joined on the pleadings and presented by the evidence were whether in connection with the mounting of the tire the employee of the garage was an agent of defendant or an independent contractor, and whether he carelessly and negligently left the car in gear after mounting the tire, and told plaintiff that it was ready to be cranked and handed him the crank for that purpose, well knowing that the car was in gear.

"The case was tried twice to a jury. The first jury returned a verdict for defendant, and judgment was entered upon it. On the tenth day after the entry of the judgment, plaintiff served upon defendant an unverified motion for new trial, containing four grounds in the following language: '1. Newly discovered evidence which is material and which plaintiff and his counsel, with due diligence, were unable to produce at the trial. 2. Mistake and prejudice on the part of the jurors. 3. The court inadvertently failed to fully and properly instruct the jury as to the law applicable in the case. 4. The verdict was secured by false testimony offered by the defendant.'

"The motion came on for hearing about ninety days after it was served. On the day of the hearing plaintiff filed a supporting affidavit in which the

affiant stated that on the afternoon of the accident, sometime past mid-afternoon, and in the best judgment of the affiant about four o'clock, plaintiff came to the place of business of the affiant in Topeka, remained there some considerable time, transacted some business, and then departed. The affidavit, but nothing else in the nature of supporting evidence, was offered upon the hearing. The court entered an order sustaining the motion and granting a new trial on all of the grounds stated in such motion, and on the further ground that the court was not satisfied with the verdict.

"The second trial resulted in a verdict for plaintiff. Judgment was entered upon it, from which defendant appealed." (T. 127-128)

The Circuit Court of Appeals reversed the decision, vacated the order granting a new trial, reinstated the verdict for defendant and directed that judgment be entered thereon in favor of the defendant. (T. 131)

The decision of the Circuit Court of Appeals was based entirely upon its ruling that the trial court did not have the power and discretion to grant a new trial and that it was an abuse of discretion to do so. Questions arising out of the second trial were not considered (T. 131) The court specifically held that Rule 59 (d) of the Federal Rules of Civil Procedure limits to ten days the time within which the court may order a new trial on the ground that the court is not satisfied with the verdict, notwithstanding the seasonable filing of a motion for new trial by one of the parties. (T. 130-

131) The court also held that the grounds of the motion, as above stated, were not sufficient to permit the trial court to grant a new trial, in the absence of supporting evidence filed with the motion. (T. 129-130)

B.

THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT.

Petitioner contends that this Court has jurisdiction to review the judgment under the provisions of Section 240 of the Judicial Code as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, which is set out as Section 347, Title 28, of the United States Code, and under paragraph 5 of Rule 38 of the Supreme Court of the United States, for the following reasons:

1. In this case the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court:

To-wit: the interpretation of the Federal Rules of Civil Procedure, and particularly Rule 59 thereof, relating to the power and discretion of a trial court to grant a new trial in a civil case tried to a jury:

(a) In holding that Rule 59 (d) of the Federal Rules of Civil Procedure prevents a federal trial court from setting aside the verdict of a jury in which he cannot concur, after the expiration of ten days from the rendition of the verdict, upon the ground that the court is not satisfied with the ver-

dict, notwithstanding the pendency of a motion for new trial, seasonably filed by the defeated party.

(b) In holding that Rule 59 requires that a motion for new trial contain a detailed elaboration of the grounds therefor, and that a simple statement of each of the grounds is not sufficient, as a matter of pleading, to authorize the court to grant a new trial.

(c) In holding that it is an abuse of discretion for a federal trial court to grant a new trial, upon timely motion, where the record contains no showing of such abuse of discretion.

(d) In holding that Rule 59 prevents consideration by the court of an affidavit setting out newly discovered evidence, upon a motion for new trial, when the affidavit was filed more than ten days after the verdict, and where the substantial rights of the parties are not prejudiced by such delay.

2. In this case the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this Court:

To-wit: in holding that the granting of a new trial by a federal court in a civil case tried to a jury may be reversed by the Circuit Court of Appeals after a second trial on the merits, on the ground of abuse of discretion; and particularly where the record shows no such abuse.

3. In this case the Circuit Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision:

To-wit: in holding that Rule 59 (d) of the Federal Rules of Civil Procedure limits the power of a federal trial judge over a case still pending before him, to set aside a verdict in which he cannot concur, which power conforms to the accepted and usual course of judicial proceedings and the form of trial by jury which is protected by the Seventh Amendment to the Constitution of the United States.

C.

THE QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Does Rule 59 (d) of the Federal Rules of Civil Procedure prevent a federal trial court, in a civil case tried to a jury, from setting aside a verdict which he does not approve, for the reason that the court is not satisfied with the verdict, more than ten days after the verdict was rendered, while the case is still pending before him on a motion for new trial seasonably filed by the defeated party?

2. Do the Federal Rules of Civil Procedure, and particularly Rule 59 thereof, prevent a federal trial court from granting a new trial, upon a motion which specifies the grounds without elaboration, as follows: "2. Mistake and prejudice on the part of the jurors. 3. The court inadvertently failed to fully and properly instruct the jury as to the law applicable in the case. 4. The verdict was secured by false testimony offered by the defendant", from a consideration of the record and pro-

ceedings at the trial, without additional supporting evidence?

3. Do the provisions of Rule 59 (c) of the Federal Rules of Civil Procedure require the trial court to disregard an affidavit containing newly discovered evidence which is not filed with the motion for new trial, nor within ten days after the verdict, but is received without formal objection and considered by the court upon the hearing of the motion, in the absence of any claim that rights of the other party were prejudiced by the delay in filing?

4. Under any of the conditions set out in paragraphs 1, 2 and 3 above, may an appellate federal court reverse the decision of the trial court in granting the new trial, reinstate the former verdict, and order judgment thereon?

5. May an appellate federal court reverse a decision by which the trial court granted a new trial, upon the ground of abuse of discretion, where the record contains no showing of such abuse?

D.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner relies on the following reasons for the allowance of the writ, and specifies the errors of the Circuit Court of Appeals as follows:

(1) The Circuit Court of Appeals erred in adopting a strict and technical interpretation of the Federal Rules of Civil Procedure;

(a) Certiorari should be granted in order that this error may be corrected as soon as possible, before other federal courts follow this precedent and crystallize the tendency toward a technical interpretation of the rules.

(b) Such interpretation is contrary to the purpose and intention of such rules.

(2) The Circuit Court of Appeals erred in the interpretation of the Federal Rules of Civil Procedure, and particularly Rule 59 thereof:

(a) In unduly restricting the power and discretion of the trial judge, while a motion for new trial is pending before him, to set aside a verdict which he cannot approve and to grant a new trial; contrary to the letter and the spirit of the rules, and restricting the form of trial by jury provided in the Seventh Amendment to the Constitution of the United States.

(b) In holding that plaintiff's motion for new trial, in which the reasons therefor are stated in a simple, concise, and direct manner, as provided in Rule 8 (e) (1), "was inadequate and defective in essential respects and failed to meet recognized requirements for such pleading".

(3) The Circuit Court of Appeals erred in holding that it is an abuse of discretion for a trial court to grant a new trial when he believes the verdict has been procured by false testimony, upon incomplete instructions, and by mistake and prejudice upon the part of the jurors, upon timely motion specifying such grounds.

(4) The Circuit Court of Appeals erred in holding that an affidavit setting out newly discovered evidence, filed more than ten days after the verdict, cannot be considered in support of a motion for new trial, which specified newly discovered evidence as one of the grounds (the motion having been filed within the ten-day period and the affidavit later), where there is no prejudice to the substantial rights of the parties by the delay in filing the affidavit.

In the accompanying brief in support of this petition, we will argue these reasons which are relied on by the petitioner for the allowance of the writ, following the above headings as the outline for such argument.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket: "No. 1983, The Marshall's U. S. Auto Supply, Inc., appellant v. George W. Cashman, appellee"; and that said judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the

premises as to this Honorable Court may seem meet and just.

Copies of the transcript of the record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with Rule No. 38 of this Honorable Court. Supporting brief is presented herewith.

GEORGE W. CASHMAN,
Petitioner.

CHARLES ROONEY,
of Topeka, Kansas,

ROY N. McCUE,
of Topeka, Kansas,

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